83 85

No. _____

In The

Supreme Court of the United States

October Term, 1982

EASTERN FOODS, INCORPORATED,
Petitioner,

vs.

R. C. McENTIRE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

JOHN D. FEAGIN
General Counsel
(Counsel of Record)
Eastern Foods, Inc.
P. O. Drawer L
Atlanta, Georgia 30337
(404) 997-1500

PAUL R. JORDAN
Fine and Block
100 Colony Square, Suite 1905
1175 Peachtree Street
Atlanta, Georgia 30361
(404) 892-7160

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether, under Rule 15(b) of the Federal Rules of Civil Procedure, petitioner was denied due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States, when the trial court allowed an amendment to respondent's Complaint at the close of the evidence, where such amended cause of action required evidence of such a nature as to prove one or more of the issues already raised by the initial pleadings.

2. Whether the action of the Fourth Circuit Court of Appeals, in affirming a lower court decision to allow an amendment to the pleadings pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, was contrary to the intent and purposes of the Rule, when the evidence that was claimed to show that an issue was tried by consent was relevant to an issue already in the case.

3. Whether a multiple jury charge covering five theories of liability, none of which were raised by the pleadings, (and only one theory was arguably encompassed by the amendment at the close of the evidence), so confused the jury and prejudiced the petitioner as to constitute a violation of the Due Process Clause under the Fifth and Fourteenth Amendments of the Constitution of the United States, and a violation of Rule 51 of the Federal Rules of Civil Procedure.

4. Whether the Fourth Circuit's sanction of the trial court's charge to the jury, concerning the appropriate measure of damages pursuant to a theory of transferee liability, constituted such a departure from the usual course of judicial proceedings as to warrant an exercise of this Court's power of supervision.

PARTIES IN PROCEEDINGS IN FOURTH CIRCUIT COURT OF APPEALS

There has not been any change in the parties participating in this case. Consequently, the caption of this Petition contains all the names of all parties. The petitioner is a Georgia Corporation, and there are no subsidiaries or other affiliates.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Law In Question	2
Statement of the Case	4
Reasons for Granting the Writ	7
I. Review by This Court is Warranted to Resolve Crucial Questions Relating to the Federal Rules of Civil Procedure, the Resolution of Which Will Affect Fundamental Principles of Due Process, and Will Have Immediate Importance Far Beyond the Particular Facts and Parties Involved in This Case	7
II. Review by This Court is Warranted to Resolve a Substantial Conflict Between The Fourth Circuit Court of Appeals and Other Federal Courts Relating to Rules 15(b) and 51 of the Federal Rules of Civil Procedure	9
A. The Fourth Circuit Court of Appeals has Decided a Question Under Rule 15(b) of the Federal Rules of Civil Procedure, Relating to Amendment of the Pleadings to Conform to the Evidence, in a Way Not in Accord with the Rule, and Contrary to the Holdings of Various Federal Courts	10
B. The Fourth Circuit Court of Appeals has Decided a Question Under Rule 51 of the Federal Rules of Civil Procedure in a Way Not in Accord with the Rule, and Contrary to the Holdings of Various Federal Courts	13
III. Review by This Court is Necessary to Rectify an Extreme Injustice Caused by a Misapplication of the Substantive Law of South Carolina	18
Conclusion	22

TABLE OF CONTENTS (Continued)

Page

Appendices:

A. Judgment and Order of the United States District Court, District of South Carolina, Columbia Division 1a

B. Judgment and Order of the United States Court of Appeals, Fourth Circuit 1b

C. Order of the United States Court of Appeals, Fourth Circuit, denying Petitioner's Motion for Rehearing 1c

TABLE OF AUTHORITIES

Cases:

American Railway Express Company v. Kentucky, 273 U.S. 269 19

Atchison, T. and S. F. Ry. Co. v. Preston, 257 F.2d 933 13

Beckroge v. South Carolina Power Company, 197 S.C. 184, 15 S.E. 2d 124, 149 A.L.R. 779 (1941) 19

Cook v. City of Price, 566 F.2d 699 (C.A. 10th, 1977) .. 12

Gallon v. Lloyd-Thomas Co., 264 F.2d 821 (C.A. 8th, 1959) 10

Hearst Corporation v. Cuneo Press, Inc., 291 F.2d 714 (C.A. 7th, 1961) 16

McClendon v. Reynolds Electric and Engineering, 432 F.2d 320 (C.A. 5th, 1970) 13

McLeod v. Stevens, 617 F.2d 1038 (C.A. 4th, 1980) ... 12

Otness v. United States, 23 F.R.D. 279 (D.C. Alaska 1979) 11

Standard Title Insurance Co. v. Roberts, 349 F.2d 613 (C.A. 8th, 1965) 10, 11

TABLE OF AUTHORITIES (Continued)

Page

Cases (Continued)

Tyler v. Dowell, Inc., 274 F.2d 890 (C.A. 10th, 1960), cert. den. 80 S.Ct. 1248, 363 U.S. 812, 4 L.Ed.2d 1153 16

United States v. Ahtanum Irrigation Dist., D.C. Wash. 1954, 124 F.Supp 818, reversed on other grounds (C.A. 9th, 1956), 236 F.2d 321, cert. den. 77 S.Ct. 386, 352 U.S. 988, 1 L.Ed2d 367 7

Constitution of the United States:

Amendment V 3
Amendment XIV 3, 4

Federal Statutes:

Federal Rules of Civil Procedure, Rule 15(b) ..... *passim*
Federal Rules of Civil Procedure, Rule 51 ..... 3, 8, 9, 13, 15, 18

No. _____

In The

Supreme Court of the United States

October Term, 1982

EASTERN FOODS, INCORPORATED,
Petitioner,

vs.

R. C. McENTIRE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

Petitioner, Eastern Foods, Inc., a Georgia Corporation (herein "Eastern"), respectfully prays that a Writ of Certiorari issue to review the judgment and decision of the Fourth Circuit Court of Appeals, entered in this case on March 10, 1983, which holds that a *De Facto* Merger occurred between Petitioner and a company called B & B Produce Processors, Inc., a North Carolina corporation. Such decision and judgment became final for the purpose of review by this Court on April 19, 1983, when the Fourth Circuit Court of Appeals denied Eastern's timely motion of rehearing. The respondent herein is R. C. McEntire, a sole proprietorship doing business in Columbia, South Carolina.

OPINION BELOW

The opinion of the Federal District Court for the District of Columbia, South Carolina has not been reported as of this date. The Judgment and Order are con-

tained in Appendix A, *infra*. The Judgment and Opinion of the Fourth Circuit Court of Appeals are not as yet reported. They are set out in Appendix B; and the Order denying petitioners Motion for Rehearing is set out in Appendix C, *infra*.

JURISDICTION

The opinion of the Fourth Circuit Court of Appeals was rendered on March 10, 1983, and became final, for the purposes of review by this Court, when the Fourth Circuit Court of Appeals denied Eastern's timely Motion for Rehearing on April 19, 1983. The jurisdiction of this Court is invoked under Rule 17(1)(a) United States Supreme Court Rules.

LAW IN QUESTION

Rule 15(b) of the Federal Rules of Civil Procedure provides:

> (b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The

court may grant a continuance to enable the objecting party to meet such evidence.

Rule 51 of the Federal Rules of Civil Procedure provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or failure to give any instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Amendment V of the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV of the United States Constitution states:

> SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State de-

prive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Eastern Foods, Inc., (Eastern) is engaged in the business of processing, manufacturing and distributing salad dressings and related products to large restaurant chains and to a number of retail grocery store chains.

On or about October 1, 1978, Eastern entered into an Option Agreement and a Management Agreement with B & B Produce Processors, Inc., (B & B), a North Carolina corporation, which gave Eastern the option to purchase either the assets or stock of B & B. R. C. McEntire (McEntire), a sole proprietorship operating out of Columbia, South Carolina, was a creditor of B & B.

Due to B & B's condition of insolvency, Eastern and B & B took steps to cut B & B's operating costs. These steps included joint use of facilities and equipment, and the establishment of an accounting and bookeeping system.

McEntire, the respondent, was in the business of selling produce. McEntire sold produce to B & B in the summer of 1978, prior to any involvement on behalf of Eastern with B & B. During that period of time, B & B had run up a substantial debt, which had not been repaid at the time Eastern entered into an Option Agreement with B & B.

McEntire subsequently filed suit against Eastern for the indebtedness incurred by B & B. McEntire's theories of action consisted of breach of contract, fraud, and violation of the Deceptive Trade Practices laws of South Carolina.

On his claim for fraud, McEntire sought actual damages of $88,750.00 plus punitive damages, claiming, in essence, that Eastern, being interested in buying B & B, falsely and fraudulently represented to him that it would honor McEntire's claim against B & B according to a payment plan which had previously been agreed upon between McEntire and B & B which caused McEntire to withdraw a formal protest he had filed with the United States Department of Agriculture seeking its aid in obtaining payment of the account. It is alleged that thereafter Eastern took all of the assets of B & B, hired the services of its president and other employees to work for it, and after all the benefits of the buyout of B & B had gone to Eastern, Eastern stopped making all payments to McEntire. It was alleged that as a consequence of his reliance upon Eastern's false and fraudulent representations and assurances that it would pay the debt of B & B to him, McEntire lost his chance of collecting the assets from B & B and lost the help of the United States Department of Agriculture in seeing that the debt was paid, all to his damage set out above.

In his claim for breach of contract, McEntire alleged that at some point in time, a new arrangement between him and Eastern was entered into whereby Eastern promised to pay him 50 percent of the debt owed him by B & B in settlement of the claim, which he accepted, but that Eastern failed to perform and thus breached its contractual obligation to pay that amount, which breach was accompanied by fraudulent acts, entitling him to recover actual and punitive damages from Eastern for the breach.

Eastern filed an answer denying the material allegations of the complaint, and asserting an affirmative defense

to the effect that is had signed no agreement with McEntire promising to pay any amount and that the plaintiff's claims were barred by the Statute of Frauds.

The case came on for trial before the honorable trial judge and a jury on April 8, 1981, and lasted for approximately three days. At the close of McEntire's evidence, counsel for Eastern moved to dismiss the complaint on the grounds that McEntire's evidence, failed to establish the claims made in the complaint. The trial judge granted the motion as to the third cause of action (for unfair trade practices) and granted it as to the fraudulent acts alleged in the second cause of action, leaving in the case the claims of fraud and breach of contract.

At the close of the evidence and after the judge charged the jury for the first time, McEntire's counsel asserted that it was not necessary to address the issue of contract as the parties had effectuated a merger. Eastern argued that no issue relative to merger had entered the case, either by virtue of the pleadings or by implied consent.

Nonetheless, the trial judge proceeded to bring the jury back into the courtroom and instruct on breach of contract, fraud, and five different theories of transferee liability (merger and consolidation constituting a portion of the charge). The jury returned a verdict against Eastern on the first verdict form, which was correlative with the breach of contract portion of the complaint, as well as the judge's instructions relative to the measure of damages relating to breach of contract.

The Fourth Circuit held that there was sufficient evidence to support either a recovery based upon breach of contract or merger. Further, the Court held that Eastern's counsel was not prejudiced by the amendment to the pleadings, inferring that the trial judge had not

abused his discretion in allowing an amendment to the pleadings to conform to the evidence.

Additionally, the Court held that the trial judge had correctly charged the jury on the substantive law, including the concept of *de facto* merger and the proper measure of damages flowing therefrom.

REASONS FOR GRANTING THE WRIT

I. Review by This Court is Warranted to Resolve Crucial Questions Relating to the Federal Rules of Civil Procedure, the Resolution of Which Will Affect Fundamental Principles of Due Process, and Will Have Immediate Importance Far Beyond the Particular Facts and Parties Involved in This Case

The premise incorporated within Rule 15(b) of the Federal Rules of Civil Procedure is simply that if evidence is introduced at trial, although unrelated to the original pleadings, the pleadings will be amended to conform to the evidence. The Court has discretion to grant a continuance or take steps necessary to reduce any unfairness caused by surprise.

Yet, Rule 15(b) was not designed to cover a universe of possibilities. Various courts have held that the Rule does not go so far as to allow an amendment where the evidence admitted was relevant to an issue specifically raised by the pleadings. Indeed, an extraordinary expansive interpretation of Rule 15(b) can only have the opposite of its intended affect.

In *United States v. Ahtanum Irrigation Dist.*, D .C. Wash. 1954, 124 F.Supp 818, reversed on other grounds (C.A. 9th, 1956), 236 F.2d 321, cert. den. 77 S.Ct. 386, 352 U.S. 988, 1 L.Ed2d 367, the Court stated that "An

attempt to try issues which have not been outlined by either pleadings or pretrial order is not only futile, but it is unjust". The Court also specifically held that "Unless the cause of action and defense be somewhere delineated before judgment, to the knowledge of the parties, due process of law has not been accorded and the trial is patently unfair".

The pleadings in the *McEntire* case did not state a claim for relief based on transferee liability; nonetheless, the trial judge instructed the jury, over the objection of Eastern's counsel, on the several ways in which a purported transferee could become responsible for the debts of another. As stated elsewhere, McEntire's complaint was predicated upon breach of contract, fraud and deceptive trade practices—not *de facto* merger or transferee liability.[1]

Fundamental principles of fairness and due process are further violated by the nature of the charge that was given to the jury. The charge that Eastern assets to be of a highly prejudicial nature is the one dealing with transferee liability. It is also the issue of transferee liability that Eastern objects to within the context of Rule 15(b). Eastern also discusses this charge in the context of Rule 51 under a subsequent heading.

---

[1] Eastern's counsel argued that five separate theories of liability had been presented to the jury, and the jury would be confused by the nature of these charges. Eastern specifically delineated its objections for the record, and the colloqy between Eastern's counsel and the trial court concerning this matter appears at pages 331-333 of the Joint Appendix filed with the Fourth Circuit Court of Appeals. Eastern raised this point in both its Motion for New Trial and at the appellate level. The Fourth Circuit acquiesced in the trial court's Order, which indicated that two paragraphs in Count II of McEntire's Complaint, which related to common-law fraud, constituted notice of transferee liability.

The point to be made at this juncture is that the charge, consisting as it did of multiple theories and technical terms, was greatly misleading. Such terms as "reincarnation", "consolidation", "merger", and "good faith purchaser" were hurled at the jury withou any explanation.

Thus, Eastern's right to a fair trial and its right to be afforded fundamental concepts of due process of law were violated by the actions of the trial court. Redress by this Court is necessary to provide the relief to which Eastern is entitled.

II. Review by This Court is Warranted to Resolve a Substantial Conflict Between the Fourth Circuit Court of Appeals and Other Federal Courts Relating to Rules 15(b) and 51 of the Federal Rules of Civil Procedure

Rules 15(b) and 51 have long been integral mainstays of the Federal Rules of Civil Procedure, and numerous federal courts have been called upon to interpret a legion of issues predicated upon these two rules. This Court has yet to find occasion to fully explore the parameters of either of these two rules. Perhaps the overall theme of liberal construction to effectuate substantial justice that permeates the spirit of the rules, combined with the discretionary aspects of these two rules in particular, have combined to preclude review.

In any event, even discretionary rules are circumscribed by parameters of due process and fundamental notions of fairness. It is this outer limit that has been transgressed in this case.

The transgression was compounded by the peculiar symmetry, or interrelationship, that exists between Rules 15(b) and Rule 51. In this case, McEntire's cause of

action was said to be amended to incorporate a cause of action predicated upon *de facto* merger. However, the term "*de facto* merger" was erroneously equated with the concept of transferee liability and the jury received a charge based on transferee liability. Thus, to the extent the pleadings could have been amended under Rule 15(b), it was totally unclear, and remains unclear, as to the exact nature of the amendment.

This *non sequitur* was perpetuated by the trial court's instructions to the jury, and the ultimate blow was dealt when the jury received verdict forms that were inconsistent with the substantive law upon which the charges were based.

A. The Fourth Circuit Court of Appeals has Decided a Question Under Rule 15(b) of the Federal Rules of Civil Procedure, Relating to Amendment of the Pleadings to Conform to the Evidence, in a Way Not in Accord with the Rule, and Contrary to the Holdings of Various Federal Courts

Although Rule 15(b) operates to amend the pleadings where evidence relating to another issue is admitted, such that a new cause of action is tried by the express or implied consent of the parties, this premise is limited to those situations where the evidence presented does not go to the proof of an issue already raised by the pleadings.

In *Gallon v. Lloyd-Thomas Co.*, 264 F.2d 821 (C.A. 8th, 1959), it was held that evidence going to the question of duress in the making of a contract even if incidentally touching some elements of fraud, may not be used to support an amendment of an issue already raised by the pleadings.

In *Standard Title Ins. Co. v. Roberts*, 349 F.2d 613

(C.A. 8th, 1965), it was held that since the record revealed that Plaintiff relied at trial on a written guaranty theory alleged in the complaint and that his assertions of fraud and negligence were only for the purpose of estopping defendant from claiming certain defenses, plaintiff would not be permitted to amend his complaint to assert a claim for indemnity based upon tort and unjust enrichment since that issue was not tried by the implied consent of the parties.

A further example of this point is found in *Otness v. United States*, 23 F.R.D. 279 (D.C. Alaska 1959), which involved an action for damages suffered by Otness's vessel as a result of an alleged collision between the vessel and a navigation aid maintained by the Coast Guard. In his complaint, Otness asserted that the navigation aid had submerged and disappeared beneath the waters in which he was sailing and that the Coast Guard was negligent in failing to locate the submerged structure and to warn mariners of the danger.

Otness subsequently moved under Rule 15(b) to amend his complaint in order to raise an additional claim for relief based on the "Willful, wanton, or reckless conduct" of the Coast Guard in the circumstances surrounding its efforts to locate the submerged structure. Plaintiff contended that the amendment related to matters that were within the scope of the proof and that defendant could not be prejudiced by it in as much as any effort that might be necessary to show that the Coast Guard's conduct was not willful, wanton, or reckless, would be virtually identical to that already undertaken to show its lack of negligence.

The Court denied the request to amend, holding that the Coast Guard had relied on Otness's complaint in

planning its defense of ordinary care and contributory negligence; that these defenses were sufficient as against an allegation of negligence but were of no avail against the charge of willful conduct; and that had defendant been aware it was going to be sued for willful and wanton conduct, it might had been able to prove willful and wanton contributory conduct on plaintiff's part.

In *Cook v. City of Price*, 566 F.2d 699 (C.A. 10th, 1977), the Court held that when evidence claimed to show trial of an issue by consent pursuant to Rule 15(b) is relevant to a separate issue already in the case, it would be unjust to the opposing party to consider a new theory of recovery after trial is complete.

Even the Fourth Circuit Court of Appeals, in *McLeod v. Stevens*, 617 F.2d 1038 (1980), has held that evidence relating to a demand for equitable relief cannot be treated as implied consent to the trial of the issue of damages.

The rationale for the above cases is the simple recognition that if evidence is introduced to support basic issues that already have been pleaded, the opposing party is not automatically conscious of its relevance to issues not raised by the pleadings.

Petitioner's argument in the context of this case is that the elements necessary to prove fraud are manifestly applicable to causes of action based on transferee liability.

Fraud was expressly denominated by respondent as a basis for relief. Indeed, respondent alleged in Counts I and II of its Complaint, respectively, breach of contract accompanied by fraudulent act and common-law fraud. The issue of transferee liability has as its core premise the concept of fraudulent conveyance. In fact, the trial court's charge on transferee liability, which was taken

from 19 Am Jur 2d *Corporations* §1546, page 923, expressly contemplates a fraudulent transaction.

Thus, the Fourth Circuit has decided a case under Rule 15(b) of the Federal Rules of Civil Procedure in a way inconsistent with decisions rendered by other circuits.

B. The Fourth Circuit Court of Appeals has Decided a Question Under Rule 51 of the Federal Rules of Civil Procedure in a Way Not in Accord with the Rule, and Contrary to the Holdings of Various Federal Courts

As a general proposition, it is the responsibility of the trial judge to instruct the jurors fully and correctly, relative to the applicable law in a given case. Further, the judge is charged with the responsibility of assisting the jurors in their search for the truth. *McClendon v. Reynolds Electric and Engineering*, 432 F.2d 320 (C.A. 5th, 1970). Yet, the responsibility of the trial judge extends even further. Obscure legal phrases and technical words should be appropriately explained to the jury; particularly where words or phrases in question are not familiar to persons of ordinary intelligence. *Atchison, T. and S. F. Ry. Co. v. Preston*, 257 F.2d 933 (C.A. 10th, 1958).

In this case, the trial court charged the jury on the issue of transferee liability, which was not raised in the pleadings. This charge contained five separate grounds of liability. More specifically, the jurors were instructed that a transferee would be liable for the debts of a transferor where there was an express or implied assumption of liability; the transaction amounts to a consolidation or merger; the transaction was fraudulent; some elements of a purchaser in good faith were absent; or the transferee was a reincarnation of the transferor corporation.

The phrasing of the charge closely paralleled the language used in numerous treatises and court decisions. It is a broad and abstract statement of the possibilities by which a successor or transferee may become responsible for the debts of a predecessor or a transferor. The disjointed repetition of the legal terminology which can be best viewed as an introduction to the law in this area, without an operative emphasis on the facts and circumstances of the case, was manifestly prejudicial.

McEntire argued that Eastern's counsel was not prejudiced by the merger issue, pointing out that Eastern's counsel had retained the services of a law-school professor, and had cross-examined McEntire's witnesses on the question of merger.

The Fourth Circuit noted these factors in their decision, and agreed with the trial judge that Eastern's counsel, under the circumstances, should not have been surprised, or otherwise adversely affected, by the charge to the jury on the issue of *de facto* merger. However, in reaching this conclusion, the Fourth Circuit has made a quantum jump over the exact nature of the charge to the jury.

As counsel for Eastern pointed out in its appellate brief, the trial judge lumped several theories of liability together, and arguably, only one dealt with *de facto* merger.

This mixed array of charges to the jury, based on issues which were not raised by the pleadings, greatly transcends the intent and scope of Rule 15(b), as discussed elsewhere in this Petition. But, the point to be made in this context is that the charge to the jury, taken as a whole, did not convey a clear and correct understanding of the applicable law. The instructions to the jury

showed a manifest tendency to confuse or mislead the jury with respect to the applicable principles of law.[2]

After all evidence had been presented at trial and the jury charged, an important discussion ensued between counsel for McEntire, counsel for Eastern, and the trial court. Eastern's counsel expressed concern that the jury would likely be confused by the charge on transferee liability, as it incorporated several different theories of liability. McEntire's counsel wanted additional charges on the issue of merger. (It was at this point that the trial court first used the term "*de facto* merger").

The trial court brought the jury back to the courtroom and charged, in pertinent part:

> And if there was a consolidation of the corporations, B & B and Eastern Foods, then Eastern would be responsible for B & B's debt to the plaintiff if there was a consolidation of those two corporations.

Subsequently, the jury asked for clarification regarding the above charge, whereupon the trial court stated:

> The second one was if there was a consolidation of B & B into Eastern Foods – That is, for all practical purposes, they consolidated into one entity – Then Eastern would be responsible for B & B's debt for the plaintiff. If they, in effect, become one.

Eastern does not dispute the general proposition that the form of instructions is generally within the trial court's discretion. On the other hand, the charge as a whole should convey to the jury a clear and correct

---

[2] Of course, this is distinguishable with the issue of whether or not counsel for Eastern was, or was not, surprised by the implicit amendment to the original pleadings. This important distinction remained nebulous, perhaps because of the interplay between Rules 15(b) and 51 inherent to the context of this case.

understanding of the applicable law. The instructions should not be confusing or misleading.

Further, the trial court should charge in plain terms, and the words used should be understandable. See *Tyler v. Dowell, Inc.*, 274 F.2d 890 (C.A. 10th, 1960) cert. den. 80 S.Ct. 1248, 363 U.S. 812, 4 L.Ed.2d 1153.

As Eastern has previously pointed out, it is beyond reason to expect that jurors of ordinary intelligence could possible understand such terms as "merger", "consolidation", "good faith purchaser", and "transferee of assets", absent at least a minimal explanation. These terms are of a technical nature and have specific legal meaning.

Additionally, that portion of the subsequent instruction relating to operating as "one" was manifestly misleading. Companies can operate as "one" in a number of instances without effectuating a merger or consolidation. Joint ventures, syndications, partnerships—all of these entities act as "one" in many instances. But, that does not lead, nor should it lead, to any conclusions of merger or consolidation.

Not only was the charge to the jury on the issue of transferee liability misleading and confusing, it was not supported by the evidence. The rationale behind the theory of transferee liability is that a purported transferor's creditors should not be deprived of their rights in the transferor's assets. Thus, a focal point of inquiry is whether or not a conveyance or transfer took place which had the effect of depriving a creditor of the right to levy against assets which would otherwise have been available. This aspect was not addressed at the trial. As noted in *Hearst Corporation v. Cuneo Press, Inc.*, 291 F.2d 714 (C.A. 7th, 1961), "an instruction upon an issue which is not supported by evidence may require a reversal of a

judgment based upon a general verdict if the instruction was inclined to lead the jury to attach to a part of the evidence a significance which such evidence lacked".

It can certainly be argued that the jury equated certain evidence relating to McEntire's fraud count to the issue of transferee liability. The salient point is that the jury received no instruction that it must first of all find that Eastern was a "transferee" of assets of a "transferor", such that McEntire suffered a detriment. Thus, the instruction to the jury on the issue of transferee liability should not have been given as the evidence adduced at trial failed to show that a "transfer" took place.

Admittedly, the Fourth Circuit found that the jury could have based their verdict on either breach of contract or *de facto* merger. The trial court reached the same conclusion in denying Eastern's motion for a new trial. However, a careful analysis of the record shows that such a conclusion is myopic.

First of all, merger and consolidation comprise only one aspect of transferee liability. As already indicated, the jury received a charge on transferee liability, not just *de facto* merger. Thus, it is erroneous to assume that the jury found that Eastern and B & B consummated a merger or consolidation.

Further, after the jury retired for deliberation, McEntire's counsel stated that the jury should have been told they need not find a contract, if a merger occurred between Eastern and B & B. Thereafter, the trial court brought the jury back in for additional charges, as discussed previously. None of the verdict forms, however, were modified to coincide with the charges that were given. Of the three verdict forms that were submitted to the jury, the first one related to breach of contract. This

form was worded in such a way that it called for actual damages as stated in the original complaint.

The crucial point to be made is that because of the totality of the instructions given to the jury by the trial court, it was impossible to determine what conclusions the jury reached. In fact, Eastern pointed out in its Petition for Rehearing that the jury could not have returned a verdict on breach of contract due to the instructions that were given. According to the instructions in this instance, the jury would have had to find that Eastern asked McEntire to withdraw the complaint filed with a federal agency. The record did not support such a request.

The mixture of instructions and charges given to the jury, along with the concomitant verdict forms, were so impregnated with incorrect substantive legal principles and inconsistencies, as to be inherently incomprehensible by persons of average intelligence. To conclude that the jury could have based their verdict on either breach of contract or *de facto* merger ignores the underlying fallacies in this case.

Review by this Court is warranted to resolve, or at least clarify, inconsistencies involved in the application of Rule 51 by the various federal courts.

III. Review By This Court is Necessary to Rectify An Extreme Injustice Caused By a Misapplication of the Substantive Law of South Carolina

Petitioner is fully aware that this Court seldom invokes its jurisdiction to review diversity cases whose results depend upon an interpretation of state substantive law. The present case is one that merits such review, and calls for this Court's exercise of its supervisory powers.

At the appellate stage, Eastern argued that the case of

Beckroge v. South Carolina Power Company, 197 S.C. 184, 15 S.E. 2d 124, 149 A.L.R. 779 (1941), operated to define the measure of damages in transferee liability cases. The *Beckroge* case stands for the proposition that a purported transferee, if liable to a transferor's creditors, is liable only to the extent of any assets received from the transferor. This proposition of law is recognized in many jurisdictions. Indeed, this Court has upheld a similar decision without opinion in *American Railway Express Company v. Kentucky*, 273 U.S. 269.

The Fourth Circuit held that Beckroge did not apply to the present case, reasoning that Eastern had merged with B & B, the presumed "transferor", and that liability followed automatically. The Fourth Circuit stated that Eastern would have been liable, as a matter of law, for all of B & B's debts. In essence then, the Fourth Circuit attributed to Eastern the consequences of *statutory* merger.

This resulted in a gross misapplication of the governing law. First of all, liability by operation of law flows from a statutory merger. Only in such a case can one corporation presume to stand good for the debts of another, absent an express undertaking to answer for the debts of another. Further, if there was an issue of merger, then the laws of the state of North Carolina should have applied, as Eastern noted in its new trial motion.

The trial judge charged the jury on the question of transferee liability, and that charge included five different ways in which a purported transferee could become liable to a transferor's creditors. Most important, the *de facto* merger charge was contained within the charge on transferee liability—it was not an exclusive charge. Thus, the fact-finders had a multiple-choice scenario, and they were not limited to *de facto* merger.

Actually, the term "*de facto* merger" was not used in the charge. That portion of the charge that related to merger was given as follows:

> Now, the transferee of assets—that's the person who received the assets from another—is not under ordinary circumstances liable for the debts of the person from whom he received those assets. However, there are exceptions to this rule. These exceptions are if they are an expressed or implied assumption of liability. *Or the transaction amounts to a consolidation or a merger.* Or the transaction is fraudulent. Or some of the elements of a purchaser in good faith were absent. Or the transferee corporation is a mere continuation or reincarnation of the old, transferor corporation. One of the facts to be considered in determining whether a corporation which has bought certain assets of a corporation has impliedly assumed the liabilities of the other corporation is the effect of the transfer upon the creditors of the predecessor corporation (Emphasis added).

The Fourth Circuit made the assumption that the jury, which retired with a general verdict form, founded its verdict upon a *de facto* merger. The term "*de facto* merger" did not arise, as indicated previously, until after the trial was completed. Thus, it is highly presumptious to conclude that the jury could have based a verdict on such a concept.

The prejudice comes by the post-trial association of the generic term transferee liability with *de facto* merger, and the resulting, and erroneous, charge to the jury on the question of damages.

The gross error lies in the fact that a statutory measure of damages was applied to a general verdict, where the charge to the jury consisted of a multiple-count charge of transferee liability. Even if it were determined that the

jury isolated the *de facto* merger aspect from the transferee liability charge, the measure of damages is the same for any segment of transferee liability. In other words, *de facto* merger as an indice of transferee liability is not synonomous with the concept of statutory merger, where liabilities are assumed by operation of law. In the case of *de facto* merger, the term "merger" is merely descriptive and without independent legal significance. It is erroneous to attribute to a *de facto* merger those consequences that accrue under a statutory merger. Notably, the trial court stated a statutory merger did not occur.

Without this Court's review of the conclusion reached by the Fourth Circuit, a grievous injustice will go uncorrected. Furthermore, ominous implications are raised for all potential investors where an option agreement can be surreptitiously elevated to the status of a merger. The results reached in this case are simply repugnant to existing concepts of free enterprise, in addition to well-established legal tenets.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully Submited,

JOHN D. FEAGIN
General Counsel
Eastern Goods, Inc.
P. O. Drawer L
Atlanta, Georgia
(404) 997-1500

Counsel for Petitioner

and

PAUL R. JORDAN
Fine and Block
100 Colony Square, Suite 1905
1175 Peachtree Street
Atlanta, Georgia 30361
(404) 892-7160

Counsel for Petitioner

INDEX TO APPENDIX

	Page
A. Judgment and Order of the United States District Court, District of South Carolina, Columbia Division	1a
B. Judgment and Order of the United States Court of Appeals, Fourth Circuit	1b
C. Order of the United States Court of Appeals, Fourth Circuit, denying Petitioner's Motion for Rehearing	1c

APPENDICES

APPENDIX A
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

(FILED April 10, 1981 by Miller C. Foster, Jr., Clerk)

CIVIL ACTION FILE NO. 79-1159-9

R. C. MCENTIRE & COMPANY,
Plaintiff,

vs.

EASTERN FOODS, INC.,
Defendant,

} JUDGMENT

This action came on for trial before the Court and a jury, Honorable ROBERT F. CHAPMAN, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff, R. C. McEntire & Company, recover of the defendant, Eastern Foods, Inc., the sum of Eighty-eight Thousand, Seven Hundred Seventy One and 50/100 ($88,771.50) Dollars, plus interest at the legal rate from November 30, 1978, and costs of action.

Dated at Columbia, South Carolina, this 10th day of April, 1980.

MILLER C. FOSTER, JR.
Clerk of Court

By /s/ JOHN C. ROGERS
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

(Microfilmed FILED Sept. 8, 1981 by John W. Williams, Clerk, U.S. District Court)
(ENTERED 9-8-81 mg)

R. C. McEntire & Company,
Plaintiff,

vs

Eastern Foods, Inc.,
Defendant.

Civil Action
No. 79-1159-9
ORDER

This matter is before the Court upon motion of the defendant Eastern Foods, Inc. for judgment notwithstanding the verdict or, in the alternative, for a new trial. Defendant claims that all of the evidence, taken in a light most favorable to plaintiff R. C. McEntire & Company fails to establish the requisite elements of plaintiff's claims for common law fraud, breach of contract, and merger. Defendant also claims that the instructions to the jury were erroneous in several respects, including the Court's submission of the issue of merger or consolidation to the jury.

Business transactions in the ordinary course and other dealings between three companies variously involved in wholesaleing produce are the basis for this litigation. Plaintiff buys produce, grades and repackages it for resale on the wholesale market. In February of 1978 plaintiff began selling produce, primarily tomatoes, on open account to a company then operated under the name of B & B Produce Processors. B & B processed produce for fast food restaurants.

B & B experienced severe financial difficulties in 1978, falling behind on its payments to plaintiff beginning in May or June of that year. In June of 1978 Mr. Richard Bowers, president of B & B, met with representatives of defendant to discuss the prospects of defendant buying B & B. Defendant also processed produce for restaurants. By August of 1978, B & B's open account with plaintiff had risen to $115,000.00, leading plaintiff to file an informal protest with the Secretary of Agriculture noting B & B's failure to pay its account with plaintiff. This protest was not immediately pursued since plaintiff and B & B worked out a plan to have B & B pay its current obligations and reduce the unpaid balance through payments of $5,000.00 and then $2,000.00 per week.

B & B and defendant met in September of 1978 to again discuss some form of buy-out or aid by defendant. The ultimate result of this and later meetings was the execution of management agreements by B & B. After defendant started managing it, and until November 30, 1978, B & B continued to honor the $2,000.00 per week obligation to plaintiff. The parties' understanding of the business relationship between defendant and B & B differs drastically.

Plaintiff claims that defendant represented and agreed it would honor B & B's obligations to plaintiff in return for plaintiff agreeing to forego prosecution of the protest with the Agriculture Department. Plaintiff claims defendant honored this promise for a short time while it merged B & B's assets into defendant's operations and attempted to capture B & B's clientele. By the end of November, the weekly $2,000.00 payments to plaintiff ceased with B & B allegedly owing plaintiff $88,750.00. Defendant claims that it merely executed an option to buy B & B

and entered management agreements during the interim to better evaluate the prospects of buying the company and to keep B & B afloat while a decision on whether to buy it was being made. Defendant claims it made no promise to honor B & B's obligations to plaintiff and that a buy-out or merger of the two companies never occurred.

Plaintiff's outstanding account with B & B, now a defunct company, was never paid. Plaintiff brought this action to determine defendant's liability for the unpaid amount owed by B & B and certain additional damages.

The complaint alleges causes of action for common law fraud, breach of contract, and unfair trade practice. The allegations in the complaint regarding fraud are in part that defendant "bought out" B & B, took all of the assets, hired some of B & B's employees, reaped the benefits of the buy-out, and then failed to honor B & B's obligations to plaintiff. On March 30, 1981, plaintiff attempted to amend the complaint to state a cause of action under the Bulk Sales Act, found at S. C. Code Ann. §36-6-101 et seq. (1976), but leave to amend was denied.

Trial began on April 8, 1981. Mr. Barron Grier, in his opening statement to the jury on behalf of plaintiff made the following remarks about the merger of defendant and B & B:

> Eastern Foods, we believe, is going . . . to hide behind documents . . . . [T]he documents that they had between B & B are not here per se illegally. They are not per se illegal and that's what they want to keep harping on—"there was nothing wrong with what we were doing: we were operating under a management agreement." You will never see in your life and never have seen a management agreement where they took over the employees, the checkbook, the warehouses, and even changed the name to Bell & Brook

> —and that sounds like B & B. No, sir. Management agreements are where I come in and help try to help manage your business. I don't put your employees on my payroll; I don't change a thing, so at the time my agreement is over, I can walk away from it and you still got your business.
>
> Under the guise of a management agreement they in fact merged, took over, and whatever you want to call it, but B & B was no more. And you're going to hear that from the actual men that ran B & B. They are going to hide behind these documents and put them up and say, "Hey there is nothing wrong with them . . . ."

During the trial plaintiff plainly and unmistakably attempted to prove that defendant had merged B & B into its operations and had converted many of B & B's assets and value to defendant's own benefit. Mr. Richard Bowers, president of B & B, testified at length about this issue, concluding defendant had started out only managing B & B, but after a short period of management, took over B & B. Mr. George King, attorney for defendant, attempted to discredit the merger testimony on cross-examination by showing that defendant had an option to buy B & B and was only offering managerial assistance until a decision about whether to buy B & B could be made.

Plaintiff offered the deposition testimony of Robert Brooks, president of defendant, on the issue of the business relationship of defendant and B & B. Plaintiff also read from the depositions of two Certified Public Accountants that had audited defendant's books for the year 1978. These men, James Laney and Jason Shellnutt, had testified that defendant took a Job Tax Credit for employees that had been employees of B & B. The accountants were unsure whether these employees worked for

B & B or defendant when the tax credit was taken.

Plaintiff called Mr. Robert Hardin, a Certified Public Accountant and Management Consultant, as an expert witness on the issue of mergers and management agreements. Mr. Hardin testified that the management agreement between defendant and B & B was unusually broad in certain aspects and that defendant had not segregated separate funds as would normally be done under a management agreement. He concluded that the two companies had in fact been merged.

Plaintiff also called Mr. Ralph Davis, a former employee of B & B hired by defendant to act as a laison between defendant and B & B's customers. Mr. Davis testified that under the guidance of Mr. William Thompson, a Vice-President of defendant, he visited various B & B clients in 1978 or early 1979 to tell them that the two companies "were merging".

At the conclusion of the plaintiff's case, the Court refused to dismiss plaintiff's causes of action for breach of contract and common law fraud. Plaintiff's causes of action for breach of contract accompanied by fraudulent act and for unfair trade practice were dismissed.

Defendant perceived and countered plaintiff's merger arguments. All of defendant's witnesses except one testified that defendant had not intended a merger with B & B. Defendant called two of the CPA's that had audited defendant's 1978 books to testify that in their opinion there had been no merger of defendant and B & B. An economist employed by defendant testified to the same effect.

The case was submitted to the jury on three separate verdict forms. In connection with these verdict forms, the jury received instructions on three separate causes of

action—breach of contract, common law fraud, and *defacto* merger. The jury was directed to use the first verdict form for actual damages if plaintiff had proved breach of contract but had failed to prove common law fraud. The jury was also instructed it would not be necessary to find that there had been a breach of contract if plaintiff had proved that defendant merged or consolidated B & B into defendant.

A separate verdict form was provided in the event the jury found plaintiff had proved common law fraud. The Court instructed the jury to use the blank spaces in this form for actual and punitive damages only if plaintiff had proved its cause of action for fraud. A third verdict form was provided in the event the jury found for the defendant on all three causes of action. The jury returned a verdict of actual damages in the amount of $88,771.50 plus interest on the first verdict form.

Defendant's motion for a judgment notwithstanding the verdict should be denied since there was adequate evidence to support a verdict of actual damages for breach of contract or a verdict of actual damages for *defacto* merger or consolidation. Defendant incorrectly asserts that there was no evidence of a bargained for consideration by which defendant induced plaintiff to withdraw its informal protest with the Department of Agriculture. Mr. R. C. McEntire testified that he was induced to withdraw the complaint by Mr. Robert Bellamy's representations that defendant would continue to honor the $2,000.00 per week until B & B's debt to plaintiff was paid in full. There was adequate evidence in the record from which the jury could infer that defendant made the promise to honor the $2,000.00 per week to induce plaintiff to withdraw the complaint. This bargained for exchange between

the parties is sufficient evidence of a legal consideration.

A transfer of assets and assumption of liabilities are the essence of consolidation or merger. *Stephenson Finance Company v. South Carolina Tax Commission*, 242 S.C. 98, 130 S.E.2d 72, 76 (1963). While a significant distinction between a consolidation and merger is recognized, the terms were used at trial interchangeably to signify a *defacto* merger of the two businesses. In *Stephenson, supra*, the South Carolina Supreme Court quoted the following definition of merger from Fletcher's *Cyclopedia Corporations:*

> A merger means the absorption of one corporation by another, which retains its name and corporate identity with the added capital, franchises and powers of the merged corporation. Id. at 75.

The concept of a merger was explained at trial by plaintiff's expert witness on the mergers, Mr. Robert Hardin. Mr. Hardin's explanation of the term was consistent with the definition by the South Carolina Supreme Court.

Contrary to the defendant's contentions, the jury was not confused by the Court's charge on merger and consolidation. Both parties proceeded from the understanding that what was being contested with respect to the merger issue was whether defendant had so integrated the assets, liabilities and income of B & B into its own operations that defendant could no longer maintain it was merely managing B & B. This was the meaning that both parties attributed to the words merger and consolidation at trial and it is essentially the same meaning as that conveyed by the legal definition of merger quoted above. Since the jury would have attributed this meaning to the words consolidation and merger, it was not confused by the use of the two words interchangeably nor was it mis-

led because the Court did not give a detailed legal definition of the words.

A synopsis of the evidence plaintiff offered to prove that a *defacto* merger had occurred is set out above at page 4. This evidence was sufficient to support a verdict for plaintiff on the issue of a *defacto* merger of defendant and B & B. Since the evidence plaintiff submitted is adequate to support a verdict for actual damages on either of the two theories upon which the case was submitted to the jury, plaintiff's motion for judgment notwithstanding the verdict will be denied.

Defendant argues that it is entitled to a new trial since the case was submitted to the jury on the issue of a *defacto* merger of B & B and defendant. It is this Court's duty to instruct the jury on every material issue raised by the pleadings and supported by the evidence. 9 Wright and Miller, *Federal Practice and Procedure:* Civil §2556 at 661-662 (1971); *Gillentine v. McKeand*, 426 F.2d 717, 724 (1st Cir. 1970). It has already been established that plaintiff submitted sufficient proof to support a recovery of actual damages on the cause of action for merger. Paragraphs five and eight of the complaint, although within that portion of the complaint alleging common law fraud, set forth facts sufficient to put defendant on notice of plaintiff's cause of action for *defacto* merger. That defendant actually had notice of this cause of action is apparent since defendant's attorneys informed the Court that they secured the services of University of South Carolina Law School Professor John Freeman, whose deposition was taken prior to trial for the purpose of acting as an expert witness for defendant on the merger issue. In addition to securing the services of Professor Freeman, defendant deposed Robert Hardin, plaintiff's expert witness

on the merger issue. Since the pleadings and evidence at trial supported a cause of action for *defacto* merger, it was not error for the Court to submit the case to the jury on that cause of action.

More problematic, however, is the issue of whether the defendant should be granted a new trial because it was unfairly surprised by plaintiff's reliance on a merger theory. Defendant argues that it was unfairly surprised by submission of the merger issue since it was not plead or discussed at the pretrial conference nor ruled upon at the motions stage following the close of the plaintiff's case. Defendant claims that had it been aware of plaintiff's reliance on the merger cause of action it would have presented the testimony of its expert on legal merger, Professor John Freeman, and would have presented more evidence of a release that would have acted as an absolute defense to plaintiff's merger claim.

Defendant cannot fairly claim that it was surprised when plaintiff ultimately relied upon a merger cause of action. As noted above, soon after the case was filed, defendant was aware of the merger cause of action and was actively preparing a defense to plaintiff's merger claims. Prior to trial it may have appeared that plaintiff intended to use the merger issue only in the context of its fraud claim, but since plaintiff had plead facts putting defendant on notice of the merger cause of action, defendant could not safely assume that plaintiff would limit its substantive claims involving merger to the cause of action for fraud.

Plaintiff apparently had not recognized the significance of its separate cause of action for merger at the time of the pretrial conference. The plaintiff discussed causes of action for breach of contract, common law fraud, unfair

trade practice, and violation of the bulk sales act, but did discuss a merger cause of action. Defendant, however, had notice of the cause of action for merger and could not safely rely on the fact that the plaintiff would not ultimately recognise the significance of a separate cause of action for merger.

Defendant should have been alerted to the fact that plaintiff intended to prove that a merger had occurred by plaintiff's counsel's opening remarks set forth above at page 3. Whether or not at the time of their opening remarks, plaintiff's attorneys realized the potency of their intentions to prove that a merger had occurred, defendant, having prior actual knowledge of the merger cause of action, should have been aware that if plaintiff proved facts sufficient to support a cause of action for merger, plaintiff would be entitled to a jury instruction on merger at the close of all the evidence.

Defendant not only recognized the fact that plaintiff was actively attempting to prove a merger of defendant and B & B, it vigorously contested the issue of merger on cross-examination and through the testimony of its own witnesses. All of defendant's witnesses except one testified that a merger of B & B and defendant had not been intended or accomplished. Mr. William Schapley and Mr. James Laney qualified as experts on the issue of business relationships and were called as experts familiar with defendant's business operations. These two certified public accountants testified that in their opinion there had been no merger of defendant and B & B. Defendant also called Mr. C. T. Abbott, an economist with defendant, to testify that defendant had never merged with B & B.

Why defendant did not call Mr. John Freeman, it's expert witness on legal merger, or why defendant did not

present more evidence on the question of a release, this Court cannot answer. Defendant may have taken a low key trial strategy with respect to a merger defense so as not to alert plaintiff to the fact that he had a merger cause of action separate from his fraud claim. Having adequate notice of the merger cause of action and having vigorously defended the issue at trial, defendant should not be allowed to claim that it was unfairly surprised when the Court charged the jury on the merger issue.

Defendant also claimed it was prejudiced when the jury was charged concerning the circumstances under which a transferee of corporate assets may become liable for the debts of the transferor corporation. Plaintiff was entitled to a charge on the various forms of transferee liability in connection with its fraud claim. Since the jury did not return a verdict for plaintiff on the fraud claim, defendant's contentions that the jury may have confused fraudulent conveyance and common law fraud are moot. At page 6 above, the Court discusses defendant's contentions that the jury charges concerning merger and consolidation were confusing and incomplete. It will not be necessary to repeat the Court's position on these matters again.

Accordingly, defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial is denied.

AND IT IS SO ORDERED.

/s/ ROBERT F. CHAPMAN
ROBERT F. CHAPMAN
UNITED STATES DISTRICT JUDGE

September 8th, 1981

Columbia, South Carolina

A TRUE COPY
Attest: John W. Williams, Clerk

By: /s/ C. RILEY
Deputy Clerk

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit
No. 81-2027
C/A 79-1159-15

[Filed March 10, 1983, U. S. Court of Appeals, Fourth Circuit.]

[Filed June 6, 1983 e/mlp, John W. Williams, Clerk, U.S. District Court]

R. C. McEntire & Company,

Appellee,

vs.

Eastern Foods, Inc.,

Appellant.

Appeal from the United States District Court for the XXXX *District of* South Carolina.

This cause came on to be heard on the record from the United States District Court for the XXXX *District of* South Carolina, *and was argued by counsel.*

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ WILLIAM K. SLATE, II
CLERK

OVER

Costs-Appellant

Cost of printing Appellee's Brief.....	$166.36
	$166.36

PETITION FOR REHEARING FILED	3/25/83
PETITION FOR RHEARING DENIED	4/19/83

CC's to Counsel

Judge Home

6-7-83
mp

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-2027

R. C. McEntire & Company,

Appellee,

v.

Eastern Foods, Inc.,

Appellants.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Robert F. Chapman, District Judge.

Argued: December 9, 1982 Decided: March 10, 1983

Before RUSSELL and WIDENER, Circuit Judges, and MICHAEL,* District Judge

---

Edward M. Woodward, Jr. (Edward M. Woodward, Woodward & Unger on biref) for Appellant; Charles F. Carpenter, Jr. (F. Barron Grier, III, Richardson, Plowden, Grier & Howser on brief) for Appellee.

*Hon. James H. Michael, Jr., United States District Judge for the Western District of Virginia, sitting by designation.

MICHAEL, District Judge,

In this appeal Eastern Foods, Inc. [hereinafter "Eastern"] challenges the district court's judgment entered in favor of R. C. McEntire & Company [hereinafter "McEntire"], for the remaining balance of an open account owed McEntire by B & B Produce Processors [hereinafter "B & B"]. Eastern's principal contention is that the trial court erred in permitting McEntire to recover on a theory of *de facto* merger, or transferee liability, where McEntire's complaint sought recovery on grounds of fraud and breach of contract. In addition, Eastern submits that even if the trial court properly submitted the issue of *de facto* merger to the jury, the court erred in charging an inappropriate measure of damages. Eastern also challenges the trial court's award of prejudgment interest. Finding no reversible error, we affirm the judgment of the district court.

In February, 1978, a course of dealing began between McEntire and B & B, processors of produce for fast food restaurants, where McEntire supplied B & B with produce on an open account arrangement. By August 1978, B & B, which was operated by Dick Bowers and Ralph Davis, owed McEntire $115,896.50 on the open account. McEntire decided to put B & B on a COD basis and to attempt to establish a system of payments. Being unsuccessful, McEntire lodged an informal complaint against Bowers and B & B on August 30, 1978, with the United States Department of Agriculture [hereinafter USDA].[1] Shortly after the complaint was lodged, Eastern took a number of steps leading to the takeover of B & B. Both

---

[1] In response to such a complaint, the USDA has the power to suspend the right of a buyer to do business in the perishable commodities market unless he satisfies his debts.

Eastern and B & B began negotiations with McEntire designed to abate any efforts by McEntire to press his claim before the USDA.

On September 12, 1978, the USDA acknowledged McEntire's informal complaint. On September 13, 1978, Bowers and B & B got $50,000 from Eastern and signed a note. At about this time, Bowers agreed to pay off the account balance and began making payments at the rate of $2,000 per week. On September 22, 1978, the USDA wrote McEntire and explained the procedures for filing a formal complaint against B & B.

During the period from mid-September until mid-October 1978, the party with whom McEntire was dealing began shifting from B & B to Eastern. Eastern drafted a set of documents which on their face purported to be an agreement to manage B & B, coupled with an option to buy. Mr. McEntire had several telephone conversations with Mr. Bellamy, Vice President of Eastern, concerning Eastern's agreement to take responsibility for B & B's $2,000 a week payment in exchange for McEntire's agreement not to pursue his complaint with the USDA. Mr. McEntire made a trip to Atlanta in order to meet with Mr. Bellamy, to inspect Eastern's facilities, so that McEntire might be satisfied as to Eastern's ability to comply with the agreement.

On September 29, 1978, a management agreement was signed giving Eastern control over B & B and an option was signed that same date giving Eastern the right to buy B & B. On October 1, 1978, a restated management agreement was signed giving Eastern virtually total control over B & B.

On October 13, 1978, McEntire wrote the USDA and asked it to hold his complaint in abeyance. On October

18, 1978, Dick Bowers sent the USDA a letter written by Mr. Abbott, an Eastern official, advising:

> The following arrangements have been agreed upon by R. C. McEntire, Eastern Foods and B & B Produce. B & B Produce and Eastern Foods are venturing into a merger of our companies. Eastern Foods met with Buddy McEntire and made financial arrangements satisfactory to R. C. McEntire.

McEntire also signed a document entitled, "Irrevocable Offer", which gave Eastern the option to liquidate the unpaid balance at a fifty (50%) percent discount. The document, which was prepared and presented by Eastern, purports to run from McEntire to B & B but was never signed or acted upon by Eastern or B & B.

On October 24, 1978, the USDA wrote McEntire, advising that it would set aside its file until November 5, 1978, in response to McEntire's request to hold his complaint in abeyance. McEntire and Eastern continued their discussions and Eastern continued to honor its agreement to pay McEntire $2,000 per week. The checks were sent from Eastern in Atlanta and written against a bank account of Eastern's in Charlotte, North Carolina, set up in the name of "Bell and Brooks". Bellamy, Vice President, and Brooks, President, were the two principals at Eastern who dealt with McEntire. On November 17, 1978, McEntire was persuaded to extend the "Irrevocable Offer" which had expired on November 15, 1978.

During this period of time, Eastern began rapidly absorbing B & B. Mr. Bowers and Mr. Davis were introducing Eastern personnel to their Hardee's contacts, B & B's principal account, and explaining that B & B was merging with Eastern. B & B employees went on the Eastern payroll and the two entities consolidated their warehouse operations into one. Vehicles of B & B were used by Eastern, and, finally, the Hardee's account was

taken over by Eastern.

While Eastern completed the merger and secured the Hardee's account, it paid the original outstanding balance of $115,896.50 down to $88,771.50. However, once the merger was complete, and the Hardee's account secure, Eastern ceased making payments to McEntire. As a result, McEntire brought this action against Eastern on theories of fraud and breach of contract.

At the conclusion of all the evidence, counsel for McEntire moved for a directed verdict on the issue of breach of contract, but asserted that it was not necessary to reach that issue because there had been a merger of B & B. Counsel for Eastern moved for a directed verdict on the causes of action for fraud and breach of contract, and argued that there was no issue of merger in the case, because it had neither been pled nor tried by consent. To that contention, the trial judge pointed out that if there was a *de facto* merger then, as an operation of law, one has a contract. Whether there has been a *de facto* merger, the court pointed out, was a question of fact, and thus the jury was charged on that issue.

All motions were denied and trial judge instructed the jury on breach of contract, fraud, and merger. The jury returned a verdict in the amount of $88,771.50, together with interest from November 30, 1978, the date of the last $2,000 payment from Eastern to McEntire. Eastern moved for judgment notwithstanding the verdict or, in the alternate, for a new trial. The trial judge denied Eastern's motion on the grounds that there was adequate evidence to support a verdict for actual damages for breach of contract or a verdict of actual damages flowing from a *de facto* merger or consolidation. In so holding, the trial judge pointed out that paragraphs 5

and 8 of the plaintiff's complaint, although within that portion of the complaint alleging common law fraud, set forth facts sufficient to put the defendant on notice of plaintiff's theory of *de facto* merger. The trial judge also pointed out that Eastern had actual notice of the *de facto* merger theory because they secured the services of a law school professor for the purpose of acting as an expert witness on the merger issue. Eastern also deposed McEntire's expert witness on the merger issue and McEntire's trial counsel mentioned merger in his opening. After a careful review of the entire record in this proceeding, it cannot be said that the trial judge erred in so holding. It is clear from the facts recited that Eastern had notice of the merger issue, was not surprised by it, and, indeed, even prepared for it. In addition, McEntire's agreement to forego prosecution of its complaint before the USDA in exchange for Eastern's weekly payments is sufficient consideration to support McEntire's breach of contract claim.

Next, Eastern contends that the trial judge erred in charging the jury on an inappropriate measure of damages. Eastern argues that McEntire's recovery is by law limited to the value of B & B's property Eastern received in the takeover. In support of this proposition, Eastern cites the South Carolina case of *Beckroge v. South Carolina Power Company*, 197 S.C. 184, 15 S.E.2d 124 (1941). In *Beckroge* it was held that where a power company received assets from a gas company for no consideration, the gas company's creditors could follow those assets into the hands of the purchasing corporation to the extent of their value. This theory of damages, the so-called trust fund theory of damages, is a correct principle of law, however, it has no application in the present case. Upon the

consolidation or merger of two corporations, the transferee or successor corporation remains fully liable for the liabilities of the transferor corporation. The distinction between the trust fund theory of damages and the merger theory of damages is that in the former you have a purchase or acquisition of another company's property where, in the latter, you have a consolidation or merger of the two companies. 19 Am.Jr.2d *Corporations*, § 1554. As noted, the facts here established a merger.

We are also unable to find error in the trial court's allowance of prejudgment interest in this case. South Carolina law allows an award of prejudgment interest where the amount sued for is a liquidated amount. *Knight v. Sullivan Power Company*, 140 S.C. 296, 138 S.E. 818 (1927); *Leaphart v. National Surety Co.*, 167 S.C. 327, 166 S.E. 415 (1932). The amount sought by McEntire, and the verdict returned by the jury, was a sum certain at the time Eastern made its last payment and the balance was due. Accordingly, under South Carolina law, the award of prejudgment interest was proper.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-2027

(FILED April 19, 1983, U.S. Court of Appeals, Fourth Circuit)

R. C. McEntire & Company,

Appellee,

versus

Eastern Foods, Inc.,

Appellant.

ORDER

Upon consideration of the appellant's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Michael for a panel consisting of Judge Russell, Judge Widener, and Judge Michael.

For the Court,

/s/ WILLIAM K. SLATE, II
CLERK

No. 83-85

In The

Supreme Court of the United States

October Term, 1983

EASTERN FOODS, INCORPORATED,
Petitioner,

vs.

R. C. McENTIRE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

CHARLES E. CARPENTER, JR.
F. BARRON GRIER, III
RICHARDSON, PLOWDEN, GRIER & HOWSER
Post Office Drawer 7788
1340 Pickens Street
Columbia, South Carolina 29202
(803) 771-8866

Attorneys for Respondent

The Respondent conceives that the four questions set out in the Petition for a Writ of Certiorari comprise essentially two questions as follows:

QUESTIONS PRESENTED

(Petitioner's Questions Presented 1 and 2)

I. Should This Court Review a Decision of the Fourth Circuit Court of Appeals Which Affirmed the Finding That McEntire Pled and Proved Eastern Foods Either Contractually Obligated Itself on an Account Payable to R. C. McEntire or Took Over the Contractual Obligation of B & B Produce Processors Which It Merged Into Its Operations?

(Petitioner's Questions Presented 3 and 4)

II. Should This Court Review a Decision of the Fourth Circuit Court of Appeals Affirming the District Court's Charge to the Jury Concerning the Appropriate Measure of Damages in a Case of Corporate Successor Liability?

TABLE OF CONTENTS

PAGE

Introduction to Argument 1

Statement of Facts 4

Reasons for Denying Writ 9

I. Should This Court Review a Decision of the Fourth Circuit Court of Appeals Which Affirmed the Finding That McEntire Pled and Proved Eastern Foods Either Contractually Obligated Itself on an Account Payable to R. C. McEntire or Took Over the Contractual Obligation of B & B Produce Processors Which It Merged Into Its Operations? (Petitioner's Questions Presented 1 and 2) 9

II. Should the Court Review a Decision of the Fourth Circuit Court of Appeals Affirming the District Court's Charge to the Jury Concerning the Appropriate Measure of Damages in a Case of Corporate Successor Liability? (Petitioner's Questions Presented 3 and 4) 11

Conclusion 16

TABLE OF AUTHORITIES

Cases: **PAGE**

Beckroge v. South Carolina Power Company, 197 S.C. 184, 15 S.E. 2d 124 (1941) 11

Constitution of the United States:

Amendment V 3
Amendment XIV 3

Federal Statutes:

Federal Rules of Civil Procedure, Rule 8 2
Federal Rules of Civil Procedure, Rule 15(b) 2, 3
Federal Rules of Civil Procedure, Rule 51 3
Federal Rules of Civil Procedure, Rule 17 15

Miscellaneous:

Fletcher, *Encyclopedia Private Corporations*, Section 7119 12
Fletcher, *Encyclopedia Private Corporations*, Section 7122 12
19 Am. Jur. 2d, *Corporations*, §1546 13
19 Am. Jur. 2d, *Corporations*, §1554 14

No. 83-85

In The

Supreme Court of the United States

October Term, 1983

EASTERN FOODS, INCORPORATED,
Petitioner,

vs.

R. C. McENTIRE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

INTRODUCTION TO ARGUMENT

This action arises out of a business contract originally made between McEntire and B & B Produce Processors under which McEntire sold produce to B & B. Eastern took over B & B and, McEntire asserted, thereby became obligated on the contract. McEntire also asserted that

Eastern had made fraudulent misrepresentations but the jury did not award any punitive damages for fraud. Eastern contends that it did not know McEntire was claiming liability by virtue of the takeover of or merger with the B & B operation. Eastern also contends that the charge to the jury of the law of damages was in error.

Eastern urges upon the Court that McEntire did not plead facts which gave notice of the merger issue; that if notice of merger is not discernable from the Complaint then it can only come through an amending of the Complaint to conform to the evidence as permitted under Rule 15(b) of the Federal Rules of Civil Procedure; and, that the District Court's permitting the verdict to stand constitutes a violation of Rule 15(b) so extreme that it becomes a violation of due process.

In response, McEntire believes it is not even necessary to reach the Rule 15(b) issue of amending the pleadings. The original Complaint alleged in Paragraph 8 of the First Cause of Action:

> That the Defendant, Eastern Foods, took all of the assets of B & B Produce Processors, Inc., and hired the services of Dick Bowers and other B & B employees to work for it, and thereafter, after all benefits of the buy-out of B & B had gone to Eastern Foods, the Defendant stopped making all payments to the Plaintiff, the last payment being made at the end of November, 1978.

Under Rule 8 of the Federal Rules of Civil Procedure, sufficient notice has been given in concise manner that McEntire alleged Eastern Foods had taken over or merged B & B into Eastern Foods. Even if it is accepted for purpose of argument that it was necessary to look to Rule 15(b) and amplify the Complaint to conform to the proof, the result reached below is proper because East-

ern Foods recognized and vigorously litigated the merger issue. There is no decision below involving Rule 15(b) that rises to the level of a violation of the Fifth Amendment or Fourteenth Amendment of the United States Constitution.

Eastern also urges upon the Court that the proper measure of damages is limited to those recoverable under the trust fund theory where assets are followed into the hands of a company who obtains an asset for no consideration; that the District Court should not have charged that a successor corporation can be fully liable for the debt; and, that to so charge the jury constitutes a violation of Rule 51 of the Federal Rules of Civil Procedure so extreme that it becomes a violation of due process.

In response, McEntire believes that the correct measure of damages was charged to the jury. The takeover or mergering of one corporation by another gives rise to full liability for the contract obligations of the corporation taken over without limiting recovery to the value of the assets of the corporation which was taken over. For the District Court to charge elements of damages consistent with such a principle does not suggest a violation of Rule 51 at all. It is simply a correct proposition of state substantive law. It does not remotely involve the Fifth Amendment or Fourteenth Amendment of the United States Constitution.

STATEMENT OF FACTS

In this Petition for Writ of Certiorari, Eastern Foods, Inc., challenges a judgment entered in favor of R. C. McEntire & Company for the remaining balance of an open account owed McEntire by B & B Produce Processors, Inc. Eastern's principal contention is that the District Court as well as the Fourth Circuit Court of Appeals erred in permitting McEntire to recover on a theory of *de facto* merger, or transferee liability for the breach of contract. Also, Eastern contends that the District Court and the Fourth Circuit Court of Appeals erred by charging an inappropriate measure of damages.

The Plaintiff, R. C. McEntire & Company, is in the wholesale produce business and sells products such as tomatoes and lettuce. In February, 1978, a course of dealing began between McEntire and B & B Produce Processors. B & B processed produce for fast food restaurants. Its major account was Hardee's. B & B was operated by Dick Bowers and Ralph Davis, who were both former officers of Hardee's. The Hardee's account represented approximately ninety (90%) percent of the B & B business and was a very large account for this type of business.

B & B had contracted with Hardee's to sell lettuce and tomatoes at a fixed rate for a period of time. The price of these products began to increase dramatically on the wholesale market, and B & B started to experience cash flow problems as a result.

The purchase and sale of produce is done by verbal agreements in the normal custom and usage of the trade. McEntire and B & B experienced no serious difficulty operating on an open account from February, 1978, until approximately the first of August, 1978. In mid-

July, 1978, Mr. McEntire went on a two-week vacation, expecting some substantial payments from B & B. Instead, when he returned around the first of August, 1978, he found the account had increased and was due in the amount of One Hundred Fifteen Thousand Eight Hundred Ninety-Six and 50/100 ($115,896.50) Dollars. McEntire immediately put B & B on a COD basis and tried to establish a system of payments, but it was unsuccessful.

On August 30, 1978, McEntire lodged an informal Complaint against Bowers and B & B with the United States Department of Agriculture. In response to such a Complaint, the Department has the power to suspend the right of a buyer to do business in the perishable commodities market unless he satisfies his debts.

In response to this Complaint, which had the potential to deprive Bowers and B & B of the right to handle the Hardee's account, a series of events took place. The Defendant, Eastern Foods, Inc., began a number of acts leading to the takeover of B & B. Both Eastern and B & B began negotiations with McEntire designed to abate any efforts by McEntire to go forward with the complaint procedures at the U. S. Department of Agriculture which could have assured McEntire of payment and risked the loss of the eligibility of Bowers and B & B to have the Hardee's account. Eastern Foods needed Bowers and B & B because they had the necessary contacts with Hardee's to get the Hardee's account.

On September 12, 1978, The U.S.D.A. acknowledged McEntire's informal Complaint. On September 13, 1978, Bowers and B & B got Fifty Thousand and No/100 ($50,000.00) Dollars from Eastern Foods and signed a Note. On September 22, 1978, the U.S.D.A. wrote McEntire and explained the procedures for filing a formal

Complaint. During the period from mid-September, 1978, until mid-October, 1978, the party with whom McEntire was dealing shifted over from B & B to Eastern Foods.

Also during this time, Eastern Foods created a set of documents which on their face purported to be an Agreement to manage B & B, coupled with an option to buy B & B. The activities engaged in by Eastern Foods, as well as the information and communications it gave out, show clearly that what Eastern Foods was doing, in fact, was merging the B & B entity into Eastern Foods.

In early September, 1978, Bowers agreed to pay off the account balance at the rate of Two Thousand and No/100 ($2,000.00) Dollars per week, and these payments were begun. This was about the same time that Eastern Foods had begun to pump money into B & B.

McEntire had several telephone conversations with Mr. Bellamy, Vice-President of Eastern Foods. These conversations dealt with the agreement of Eastern Foods to undertake the continuing payment of the unpaid balance at the rate of Two Thousand and No/100 ($2,000.00) Dollars per week and McEntire's continuing to forebear on his right to pursue a Complaint with the U.S.D.A.

McEntire even made a trip to Atlanta to meet with Mr. Bellamy of Eastern Foods and inspect their facilities in order for Mr. McEntire to be satisfied of Eastern Food's ability to comply with such an agreement. Mr. McEntire was persuaded and agreed.

On September 29, 1978, a Management Agreement was signed giving Eastern Foods control over B & B and an option was signed that same date giving Eastern Foods the right to buy B & B. On October 1, 1978, a Restated Management Agreement was signed giving Eastern Foods virtually total control over B & B.

On October 13, 1978, McEntire wrote the U.S.D.A. and asked it to hold the Complaint in abeyance. On October 18, 1978, Dick Bowers wrote the U.S.D.A. and advised that B & B Produce and Eastern Foods were merging and that, further, Eastern Foods had met with McEntire and made satisfactory financial arrangements.

At approximately this time, Eastern Foods, in addition to agreeing to pay off the balance at the rate of Two Thousand and No/100 ($2,000.00) Dollars per week, also persuaded McEntire to sign a document called an "Irrevocable Offer", which would give Eastern Foods the option to liquidate the balance at a fifty (50%) percent discount by paying twenty-five (25%) percent of the balance in cash and the remainder in twelve (12) payments. The document purports to run from McEntire to B & B. It was prepared by Eastern Foods and presented to McEntire by Eastern Foods. It bears no date. It was never accepted and acted upon by Eastern Foods or B & B.

On October 24, 1978, the U.S.D.A. wrote McEntire, advising that it would set aside its file until November 5, 1978, in response to McEntire's request. Further discussions went on between McEntire and Eastern Foods. The agreement to pay Two Thousand and No/100 ($2,000.00) Dollars per week was being honored during this time by Eastern. On November 17, 1978, McEntire was persuaded to extend the "Irrevocable Offer" which had expired on November 15, 1978.

During this period of dealing with McEntire, Eastern Foods had been rapidly absorbing B & B into Eastern Foods. Mr. Bowers and Mr. Davis were introducing personnel of Eastern Foods to the Hardee's contacts and explaining that B & B was merging with Eastern Foods. B & B employees went on the Eastern Foods' payroll. Warehouse operations of the two entities were consoli-

dated as one operation. Vehicles of B & B were used by Eastern Foods. The Hardee's account was taken over by Eastern Foods.

While these actions were being taken, Eastern Foods continued to send checks to McEntire from Atlanta in the amount of Two Thousand and No/100 ($2,000.00) Dollars per week. The checks were sent from Eastern Foods in Atlanta and written against a bank account of Eastern Foods in Charlotte set up in the name of "Bell and Brooks". Bellamy, Vice-President, and Brooks, President, were the two principals at Eastern Foods who dealt with McEntire.

While Eastern Foods was completing the merger of the B & B operation into its own and securing the Hardee's account, it paid the outstanding balance which was originally One Hundred Fifteen Thousand Eight Hundred Ninety-Six and 50/100 ($115,896.50) Dollars down to a balance of Eighty-Eight Thousand Seven Hundred Seventy-One and 50/100 ($88,771.50) Dollars. Once the merging of B & B into Eastern Foods was complete and the Hardee's account secure, Eastern Foods breached its promise to pay the balance off at the rate of Two Thousand and No/100 ($2,000.00) Dollars per week. The last payment was made for the week ending November 30, 1978.

The case was tried before the United States District Court Judge Robert F. Chapman during April 8-10, 1981. The jury returned a verdict in the amount of Eighty-Eight Thousand Seven Hundred Seventy-One and 50/100 ($88,771.50) Dollars, together with interest from November 30, 1978, which was the date of the last Two Thousand ($2,000.00) Dollars payment from Eastern Foods to McEntire. On appeal, the judgment of the District Court was affirmed.

REASONS FOR DENYING WRIT

I. Should This Court Review a Decision of the Fourth Circuit Court of Appeals Which Affirmed the Finding That McEntire Pled and Proved Eastern Foods Either Contractually Obligated Itself on an Account Payable to R. C. McEntire or Took Over the Contractual Obligation of B & B Produce Processors Which It Merged Into Its Operations?

(Eastern's Questions 1 and 2)

Eastern Foods, Inc., contends that the takeover or merger was not pled. Eastern further asserts that it was surprised by the merger issue at trial. Finally, Eastern contends there was insufficient evidence to support a verdict that Eastern Foods had become obligated on the B & B contract. Both the District Court and the Fourth Circuit Court of Appeals have pointed out that Paragraphs 5 and 8 of the Plaintiff's Complaint set forth facts sufficient to put the Defendant on notice of the Plaintiff's theory of *de facto* merger. The Complaint alleged in part:

> "That the Defendant, Eastern Foods, took all of the assets of B & B Produce Processors, Inc., and hired the services of Dick Bowers and other B & B employees to work for it, and thereafter, after all benefits of the buy-out of B & B had gone to Eastern Foods, the Defendant stopped making all payments to the Plaintiff, the last payment being made at the end of November, 1978."

Both the District Court and the Fourth Circuit Court of Appeals also pointed out that Eastern Foods had actual notice of the *de facto* merger theory because they

secured the services of a law school professor for the purpose of acting as an expert witness on the merger issue. In addition, the Fourth Circuit opinion reveals that Eastern Foods deposed McEntire's witness on the merger issue and McEntire's trial counsel mentioned merger in his opening statement to the jury. The opinion of the Fourth Circuit Court of Appeals states:

> "It is clear from the facts recited that Eastern Foods had notice of the merger issue, was not surprised by it, and, indeed, even prepared for it."

Also, aside from any contractual obligation resulting from merger, the decision of the Fourth Circuit of Appeals points out that there is sufficient evidence that Eastern independently obligated itself in a contract with McEntire:

> "In addition, McEntire's agreement to forego prosecution of it's Complaint before the U.S.D.A. in exchange for Eastern's weekly payment is sufficient consideration to support McEntire's breach of contract claim."

The specific reference in the opinion of the Fourth Circuit is to a letter written on October 18, 1978, and sent to the Complaint Section of Regulatory Branch of the Fruit and Vegetable Division of the U.S.D.A. and reads as follows:

> "This letter is in regards to the informal Complaint from R. C. McEntire to the P.A.C.A. The following arrangements have been agreed upon by R. C. McEntire, Eastern Foods and B & B Produce. B & B Produce and Eastern Foods are venturing into a merger of our companies. Eastern Foods met with Buddy McEntire and made financial arrangements

satisfactory to R. C. McEntire. You should receive your letter from R. C. McEntire explaining the terms within two or three days."

There was no surprise to Eastern that McEntire asserted Eastern was obligated on the B & B account because of having taken over the entire business of B & B. There was sufficient evidence to support a jury factual finding. The affirming of the result by the Court of Appeals does not raise a due process issue.

II. Should The Court Review A Decision Of The Fourth Circuit Court Of Appeals Affirming The District Court's Charge To The Jury Concerning The Appropriate Measure Of Damages In A Case Of Corporate Successor Liability?

(Eastern's Questions 3 and 4)

Next, Eastern Foods contends that an inappropriate measure of damages was used. Eastern argued that McEntire's recovery was limited to the value of the property Eastern Foods received in the take-over of B & B. Eastern Foods cites the South Carolina case of *Beckroge v. South Carolina Power Company*, 197 S. C. 184, 15 S. E. 2d 124 (1941). In *Beckroge* it was held that where a power company received assets from a gas company for no consideration, the gas company's creditors could follow those assets into the hands of the purchasing corporation to the extent of their value. This theory of damages, the so-called trust fund theory of damages, is a correct principle of law; however, it has no application in the present case. Upon the consolidation or merger of two corporations, the transferee or successor corporation remains fully liable for the liabilities of the transferor corporation. The distinction between

the trust fund theory of damages and the merger theory of damages is that in the former there is a purchase or acquisition of another company's property where, in the latter, there is a consolidation or merger of the two companies.

It has long been a principle of law that upon a consolidation or merger of two corporations, the transferee or successor corporation remains fully liable for the liabilities and debts of the transferor corporation. In Section 7119 of Fletcher, *Encyclopedia Private Corporations*, the correct rule is stated as follows:

> A consolidated company is liable on the claims against the constituent companies without regard to the amount of assets received from them. This is undoubtedly the true rule, although language used in some of the decisions might be construed to indicate a limitation of liability to the property received.

In Section 7122 of the same work, the distinction is made between a mere purchase or acquisition of another company's property and a situation in which there is a consolidation or merger or some other undertaking. In Section 7122, it is pointed out that:

> The purchasing or transferee company, that is to say, is not liable on the other company's obligations merely by reason of its succession to such company's property. An express agreement, or one that can be implied, to assume the other company's debts and obligations, is necessary; or the circumstances must warrant a finding that there was a consolidation or merger of the corporations, or that the transaction was fraudulent in fact, or that the purchasing company was a mere continuation of

the selling company; the foregoing constitute the so-called exceptions to the general rule.

This rule as set out by Fletcher above has been followed by a multitude of cases which are cited in that work in support of the rule and is virtually identical to the language found in 19 Am. Jur. 2d, *Corporations*, §1546, which provides:

> There are certain instances, however, in which the purchaser or transferee may become liable for the obligations of the transferor corporation: (1) where there is an express or implied assumption of liability; (2) where the transaction amounts to a consolidation or merger; (3) where the transaction was fraudulent; (4) where some of the elements of a purchase in good faith were lacking, as where the transfer was without consideration and the creditors of the transferor were not provided for; or (5) where the transferee corporation was a mere continuation or reincarnation of the old corporation.

Judge Chapman's charge on the rights of creditors against transferee or successor corporations was a sound statement of the law in that regard.

With repect to damages, Judge Chapman charged the following:

> Normally, the damages recoverable from breach of contract are those which follow as a natural consequence supposed to have been within the contemplation of the parties at the time the contract was entered into.
>
> One who breaches a contract to pay money is normally liable for the amount of money specified in the contract itself.

This is the classic definition of damages for breach of contract, and it would be both the measure of damages with respect to any independent agreement between Eastern Foods and McEntire, as well as any contract obligation which Eastern Foods is obligated under as a result of a *de facto* merger of B & B.

Eastern Foods would have the Court limit damages to the value of the assets received. There is no basis in law for the application of the trust fund theory in this case. The jury may well have found that Eastern Foods independently obligated itself under the contract, and Judge Chapman's statement of the measure of damages in a breach of contract action is appropriate. On the other hand, the jury may have concluded that Eastern Foods was obligated under the contract of B & B as the result of a merger in fact, and in that instance, Judge Chapman's charge is again the correct measure of damages. 19 Am. Jur. 2d, *Corporations*, §1554, provides, in part:

> Generally speaking, where a corporation succeeds to the assets of another corporation by virtue of a consolidation or merger and not by way of purchase, the new or resulting corporation is liable for the debts and contracts of the other corporation, although there is no statute imposing any liability and no agreement assuming it. Corporations cannot, by consolidation, escape the obligation to pay debts incurred before the consolidation or defeat the right of their creditors to subject their property to the satisfaction of such debt.

The correct measure for damages for breach of the contract obligations of Eastern Foods to McEntire are those which followed as a natural consequence of the breach or which may reasonably be supposed to have been within the contemplation of the parties at the time the agreements were entered into. That amount was the

balance due on the account and was obviously within the contemplation of McEntire, Eastern Foods and B & B. The District Court's charge to the jury of the measure of damages was not only correct but it in no way raises an issue of due process which requires further review.

CONCLUSION

A decision by the Fourth Circuit Court of Appeals: (1) that there is sufficient evidence to support a finding of liability for the balance due on the account by the successor corporation; and that there was no surprise in this issue being in the trial; and (2) that damages were properly charged, constitute not only a correct resolution of the case, but do not suggest sufficient reason for this Court to exercise its discretion under Rule 17 to review the opinion below. There is no conflict between Federal Courts of Appeals. There is no Federal question which is conflicting with a State Court of last resort. There is no departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. No State Court decision of a Federal question is in conflict with the decision of another State or Federal Court and no Court has decided an important question of Federal Law which needs to be settled.

Respectfully submitted,

CHARLES E. CARPENTER, JR.
F. BARRON GRIER, III
of RICHARDSON, PLOWDEN, GRIER & HOWSER
Post Office Drawer 7788
1340 Pickens Street
Columbia, South Carolina 29202
(803) 771-8866

Attorneys for Respondent

No. 83-85

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EASTERN FOODS, INCORPORATED,
Petitioner,

vs.

R. C. McENTIRE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

REPLY BRIEF FOR PETITIONER

JOHN D. FEAGIN
General Counsel
(*Counsel of Record*)
Eastern Foods, Inc.
P. O. Drawer L
Atlanta, Georgia 30337
(404) 997-1500

PAUL R. JORDAN
Fine and Block
100 Colony Square, Suite 1905
1175 Peachtree Street
Atlanta, Georgia 30361
(404) 892-7160

Attorneys for Petitioner

TABLE OF CONTENTS

Page

I. RESPONDENT'S COMPLAINT WAS PREDICATED UPON BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACT AND COMMON-LAW FRAUD; RULE 15(b) PROVIDES THE ONLY RATIONALE FOR THE SUBSEQUENT JURY CHARGE ON TRANSFEREE LIABILITY 2

II. RESPONDENT'S CONTENTION THAT THE JURY COULD HAVE FOUND THAT EASTERN INDEPENDENTLY OBLIGATED ITSELF TO ANSWER FOR B & B'S INDEBTEDNESS TO McENTIRE IS TOTALLY INCONSISTENT WITH THE INSTRUCTIONS GIVEN TO THE JURY AND NONRESPONSIVE TO PETITIONER'S ARGUMENT THAT THE TOTALITY OF THE JURY INSTRUCTIONS WERE VIOLATIVE OF PETITIONER'S RIGHT TO DUE PROCESS OF LAW 3

III. THE QUESTION OF DAMAGES IS ORDINARILY A MATTER OF STATE SUBSTANTIVE LAW; HOWEVER, THE CHARGE GIVEN TO THE JURY IN THIS CASE TRANSCENDS FUNDAMENTAL SAFEGUARDS OF RULE 51 AND CONSTITUTES AN INORDINATE VIOLATION OF DUE PROCESS OF LAW 5

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases:

Beckroge v. South Carolina Power Company, 197 S.C. 184, 15 S.E.2d 124, 149 A.L.R. 779 (1941) 8

Federal Statutes:

Federal Rules of Civil Procedure, Rule 8 2
Federal Rules of Civil Procedure, Rule 15(b) ... 2, 3, 9
Federal Rules of Civil Procedure, Rule 51 ..... 4, 5, 9

Miscellaneous:

15 A.L.R. 1104 ..... 7, 8
19 Am.Jur.2d, *Corporations*, §1559 7
19 C.J.S., *Corporations*, §1630 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EASTERN FOODS, INCORPORATED,

Petitioner,

vs.

R. C. McENTIRE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

REPLY BRIEF FOR PETITIONER

There are two pivotal points in this case. One deals with the injection of a separate and distinct legal theory into the case, and the other deals with the jury charge associated with that theory.[1]

[1] Petitioner argues that the theory of transferee liability was not stated in the complaint. Respondent cites a paragraph in its brief to support its argument that, although stated under a different theory, was nonetheless sufficient notice of Respondent's claim of transferee liability or *de facto* merger. The trial court record (pertinent portions cited in Petitioner's brief) reveals that the actual charge to the jury was a mixture, consisting of all the various ways in which a successor corporation could be responsible for the debts of a transferor. In actuality, the jury could have found that (a) there was an express or implied assumption of liability, (b) the transaction amounted to a consolidation or a merger, (c) the transaction was fraudulent, (d) that some of the elements of a purchaser in good faith were absent, or (e) that the transferee corporation was a continuation of the old one. This, of course, presupposes that Petitioner received B & B's assets. The record overwhelmingly shows that Petitioner lost a substantial amount of money in its dealings with B & B.

Petitioner's argument is that, to the extent transferee liability entered the case, it did so via Rule 15(b). Even if it is conceded that Respondent's Complaint was sufficient to give adequate notice of such a theory, Petitioner takes the position that the jury charge was grossly inadequate in this regard. Further, Petitioner argues that the Fourth Circuit committed a serious and highly prejudicial error when it acquiesced in Respondent's argument that a merger had occurred. This, in turn, led to the inevitable disagreement over the proper measure of damages.

I. Respondent's Complaint was Predicated Upon Breach of Contract Accompanied by Fraudulent Act and Common-Law Fraud; Rule 15(b) Provides the Only Rationale for the Subsequent Jury Charge on Transferee Liability.

Respondent argues that is is not necessary to reach the Rule 15(b) issue, since Respondent's original complaint gave sufficient notice under Rule 8. However, Respondent's complaint stated causes of action based on breach of contract accompanied by fraudulent act and common-law fraud. An examination of the paragraph cited by Respondent in its brief reveals that the term "merger" is nowhere to be found. On the contrary, the word "buy-out" is used:

> That the Defendant, Eastern Foods, took all of the assets of B & B Produce Processors, Inc., and hired the services of Dick Bowers and other B & B employees to work for it, and thereafter, after all benefits of the *buy-out* of B & B had gone to Eastern Foods, the Defendant stopped making all payments to the Plaintiff, the last payment being made at the end of November, 1978. (Emphasis added).

Clearly, "buy-out" refers to a purchase and sales transaction and not to a merger. Therefore, to the extent an

additional theory came into the case, it entered through the rather broad doors of Rule 15(b).[2]

II. Respondent's Contention That the Jury Could Have Found That Eastern Independently Obligated Itself to Answer for B & B's Indebtedness to McEntire is Totally Inconsistent With the Instructions Give To the Jury and Non-responsive to Petitioner's Argument that the Totality of the Jury Instructions Were Violative of Petitioner's Right to Due Process of Law.

Respondent takes the position that an independent contractual relationship arose between McEntire and Eastern, whereby Eastern agreed to answer for the indebtedness of B & B. In order to find an independent basis in contract, as Respondent claims the jury could have done, the jury would have had to totally ignore the following essential instruction:

> In order to find for the plaintiff, you must find that the defendant made the promise to pay the debt as claimed by the plaintiff to withdraw the complaint filed with the United States Department of Agriculture. *Even if you find that the defendant made the promise to pay the debt, you must find for the defendant unless you also find that the defendant asked the petitioner to withdraw his complaint.* The mere fact that the plaintiff withdrew his complaint is not sufficient to entitle him to recover damages from the defendant. (Emphasis added).

---

[2] Petitioner's key point, as noted previously, is that the Complaint did not state a cause of action based on de facto merger or transferee liability. A charge of transferee liability was given to the jury, and as noted at page 20 of Petitioner's brief, the total charge included the phrase: "Or the transaction amounts to a consolidation or merger". This is one of several factual scenarios that the jury *could* have found. However, neither the verdict nor the actual judgment support Respondent's contention that a merger in fact occurred.

In apparent recognition of this point, Respondent refers to a letter written to the U.S.D.A. by an officer of B & B Produce Processors, Inc. However, this does not represent a request *on behalf of Eastern* to McEntire, asking McEntire to withdraw his informal complaint. At best, Respondent can only find support in the record for "half a loaf" since the jury was specifically instructed that not only must McEntire withdraw his complaint, but such withdrawal must be at the specific request of Eastern. That McEntire withdrew a complaint or decided not to pursue some right he may have had is meaningless unless Eastern *bargained* for such a consideration. There is simply no basis in the record to prove that Eastern asked McEntire to withdraw a complaint. Petitioner raised this point to the Fourth Circuit, but the Opinion does not indicate a consideration of this particular aspect.[3]

The focal point of inquiry, however, centers on the totality of the instructions to the jury. As petitioner has previously argued, it is the mixture of instructions and the manner in which the jury proceeded to reach a verdict that underscores a violation of the due process clause, and an aberration of Rule 51. The taint engendered thereby is not lessened by a piece-meal severance of the jury instructions and a retrospective, self-fulfilling analysis thereof.

---

[3] The presumption seems to have been that Dick Bowers, President of B & B Produce Processors, Inc., signed the letter in question after it had been written by K. L. Abbott, an officer of Eastern Foods. This is contrary to the record, but even if accepted at face value, it is still irrelevent to the issue of whether Eastern requested McEntire to withdraw his complaint. Certainly, the U.S.D.A. was not McEntire's agent.

III. The Question of Damages is Ordinarily a Matter of State Substantive Law; However, the Charge Given to the Jury in This Case Transcends Fundamental Safeguards of Rule 51 and Constitutes an Inordinate Violation of Due Process of Law.

Respondent continues to perceive the vital question relative to damages as essentially one of distinction between an acquisition by purchase and an acquisition by merger. It is this distinction that has served, in large measure, to obscure the true legal issues inherent in this case.

The discursiveness of Respondent's logic is readily demonstrated by raising certain obvious questions. First of all, given that a portion of the relevant charge to the jury was stated thusly:

> Now, the transferee of assets—that's the person who received the assets from another—is not under ordinary circumstances liable for the debts of the person from whom he received those assets. However, there are exceptions to this rule. These exceptions are if they are an expressed or implied assumption of liability. Or the transaction amounts to a consolidation or a merger. Or the transaction is fraudulent. Or some of the elements of a purchaser in good faith were absent. Or the transferee corporation is a mere continuation or reincarnation of the old, transferor corporation. . . ,

is it proper to conclusively presume that the jury opted for that portion of the charge which stated:

> . . . Or the transaction amounts to a consolidation or merger . . . ?

Furthermore, if as respondent contends, sufficient notice of a claim of merger was stated in the original complaint, why is it that the jury received an ubiquitous

charge on transferee liability? Given that Respondent actually used the term "buy-out" in its original complaint, not merger or consolidation, what is it that supports the argument that the nexus between the theory of relief stated in the complaint and the return of a general verdict by the jury conclusively demonstrates that Eastern effectuated a merger with B & B?

Again, it is Eastern's contention that the seeds of manifest prejudice were sown within the instructions that were given to the jury. Expressed by way of another question: Is an aggrieved party entitled to single out one portion of a related jury charge and thereby attach to it a measure of recovery that is indisputably not available with the other portion. This allows a party, in a case such as this, to pick and choose one of several results that a jury could have found, obviously selecting the one that affords the greatest recovery. This is not due process of law by any stretch of the imagination and it is overwhelmingly repugnant to the most basic notions of fundamental fairness.

Even if there were some way to ascertain that the jury found that a merger-in-fact occurred, petitioner still disagrees with Respondent's position because no instructions were given that the jury could apply to determine whether a merger occurred. That the terms "merger" or "consolidation" were never explained to the jury is readily apparent from the record. Equally important, though, is Respondent's examination of the law.

Respondent continues to neglect crucial distinctions between a *de jure* and a *de facto* merger. Where a *de jure* or statutory merger has been effectuated, most jurisdictions provide that the surviving entity assumes all of the liabilities of the nonsurviving entity. This is not the proper

measure of damages under *de facto* merger or transferee liability.

In this regard, Respondent has cited respected authorities in support of its position that the proper measure of damages must take into account all liabilities of a transferring entity. Yet, the same authorities make a crucial distinction. In 19 Am.Jur. Section 1559, the rule is stated as follows:

> Assuming that a corporation succeeding to the assets of another corporation may be held liable for obligations of the latter, the extent to which liability exists against the successor corporation has been variously stated. It is sometimes said that liability is limited to the amount of property received. *This is particularly true in case of an absorption of the property of the debtor corporation—in other words, a merger in fact.* (Emphasis added).

An equally distinguished treatise states as follows:

> Where there is no consolidation or merger, liability, is any, resulting from the acquisition by one company of the assets and business of another, is not primary; *it is limited to the value of the assets received*, or the value of a portion thereof to which creditors of the transferring corporation were entitled to look for the payment of their claims, and it accrues only after the creditors have exhausted their remedies against the corporations with which they contracted. 1630 C.J.S. 1403. (Emphasis added).

Finally, in 15 A.L.R. 1104, the annotator states:

> Where there is an absorption of the business and assets—in other words, a merger de facto—either by a corporation formed for the purpose, or by one already in business, the liability of the corporation receiving the assets is, where it exists, based upon the so-called "trust-fund doctrine", on the grounds that such receiving corporation does not stand as a

> bona fide purchaser for value. In such case the extent of the liability is necessarily determined by the value of the property received.

The controversy over the measure of damages endures because it was accepted, ipso facto, that the jury reached the conclusion that a merger occurred. It is this initial presumption and its consequences that underscore Petitioner's concern. Again, even a cursory reading of the original complaint reveals that Respondent used the term "buy-out" not merger; and a review of the jury instructions shows that the jury could have found that a purchase for an inadequate consideration occurred as opposed to a merger. Respondent readily admits that the case of *Beckroge v. South Carolina Power Company*, 197 S.C. 184, 15 S.E.2d 124, 149 A.L.R., 779 (1941), applies to "purchase" transactions, but not to *de facto* merger situations. Also, Respondent contends that the trust-fund theory has no application in regard to a *de facto* merger. Yet, the annotation noted above states that a merger *de facto* and a purchase for less than adequate consideration are both within the purview of the "trust-fund" doctrine.

CONCLUSION

Petitioner strongly asserts that it has been denied due process of law in this case. This denial manifests itself by subtle, yet deleterious, violations of accepted parameters associated with Rules 15(b) and 51 of the Federal Rules of Civil Procedure. Further, Petitioner believes that this Court's powers of supervision are invoked due to the Fourth Circuit's acquiescence in an interpretation of law which is at all odds with the substantive law of the State of South Carolina.

Respectfully submitted,

/s/ JOHN D. FEAGIN

John D. Feagin
General Counsel
(*Counsel of Record*)
Eastern Foods, Inc.
P. O. Drawer L
Atlanta, Georgia 30337
(404) 997-1500

PAUL R. JORDAN
Fine and Block
100 Colony Square, Suite 1905
1175 Peachtree Street
Atlanta, Georgia 30361
(404) 892-7160

Attorneys for Petitioner